Lancet Arch, Inc. *and* Bricklayers and Allied Craftsmen, Local 11, AFL–CIO. Cases 3–CA–19579 and 3–CA–19770

August 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 11, 1997, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the Charging Party filed cross-exceptions and a supporting brief, and the General Counsel filed a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, to adopt the recommended Order as modified,[3] and to substitute a new notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Lancet Arch, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Refusing to provide employment application forms to union members.''

2. Substitute the following for paragraph 2(a).

''(a) On request, provide employment application forms to Bruce Carlin, Doug Morey, Frank Mirabella, Dan McCarthy, and Larry Hand.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with loss of work if they sign a petition seeking a wage increase.

WE WILL NOT refuse to provide employment application forms to union members.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, provide employment application forms to Bruce Carlin, Doug Morey, Frank Mirabella, Dan McCarthy, and Larry Hand.

LANCET ARCH, INC.

Ron Scoff, Esq., for the General Counsel.
Luther C. Nadler, Esq. (Nadler & Reeve), of Fairport, New York, for the Respondent.
Matthew J. Fusco, Esq. (Chamberlain, D'Amanda, Oppenheimer & Greenfield), of Rochester, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Rochester, New York, on June 4,

[1] The Respondent also requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent and the Charging Party have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Respondent argues that the judge's proposed Order and notice are overbroad insofar as they require the Respondent to affirmatively consider union members Carlin, Morey, Mirabella, McCarthy, and Hand for hire. The Respondent asserts, and the General Counsel concedes, that the sole pled and litigated 8(a)(3) allegation in this case was that the Respondent unlawfully refused to provide these five individuals with employment applications. It was not alleged that there were available positions for the five union members, nor claimed or established on the record that the Respondent refused to consider the five for hire. In these specific circumstances, where the 8(a)(3) allegation was expressly restricted to the Respondent's failure to proffer employment applications, we have modified the Order and notice to delete the judge's additional ''consider for hire'' language.

Although we agree with the sentiments expressed by our dissenting colleague, we believe that the Order here must be tailored to the litigated violation. Of course, if the Respondent, after having distributed applications, discriminatorily refuses to consider or hire the applicants, the Board stands ready to hear and remedy that violation on the filing and trial of meritorious charges.

Chairman Gould would adopt the judge's proposed Order and notice. In his view, requiring the Respondent to engage in the mere ministerial act of providing applications to the discriminatees does not remedy the violation. To make the remedy meaningful, the Respondent must provide applications and consider them on the same basis as other applicants.

1996. Upon charges filed on September 5 and December 4, 1995,[1] as amended, a consolidated complaint was issued on April 19, 1996, alleging that Lancet Arch, Inc. (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with an office and place of business in Rochester, and with jobsites in East Rochester and Rochester, has been engaged in the business of masonry construction and waterproofing. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Bricklayers and Allied Craftsmen, Local 11, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Beginning in late 1993 the Union began an effort to organize the employees of Respondent. In November 1994 the Union requested recognition by Respondent as the bargaining representative of its employees. By letter dated December 12, 1994, Respondent declined to recognize the Union without a Board-conducted election. There is no history of collective bargaining between the parties.

On March 20, 1995, Ronald J. Pommerening, the union organizer, accompanied by union members Frank Mirabella, Doug Morey, Dan McCarthy, and Bruce Carlin went to Respondent's office to apply for employment. Pommerening introduced himself to the receptionist as ''Ron Pommerening with the Bricklayers Local 11'' and introduced the others as ''members of Local 11.'' They were all wearing union hats and some of them were also wearing union T-shirts. The receptionist told them to wait for a minute and she left the room and returned with William Farmer, president of Respondent. When Farmer appeared Pommerening asked him ''if he was looking for any masons at the time, that we were here in hopes of putting in our applications.'' Farmer told the group that ''he was not looking for any masons'' and he further stated that:

> [h]e still had other masons that he had to call back, that were on present layoff, and also indicated to me that if . . . I knew of any good laborers, that he was hiring laborers and looking for laborers at that present time.

On April 10 Pommerening again came to Respondent's office accompanied by Mirabella and Larry Hand. The three were wearing union hats. Someone by the name of ''Tony'' was at the office and Pommerening asked him if ''we could possibly put in applications for employment as bricklayers.'' Tony replied that ''they were still slow at that time and that they were not offering any applications to the masons, bricklayers.''

Carlin credibly testified that he came to Respondent's office again on April 21. This time he was not wearing a union hat or a union T-shirt. He told the receptionist that ''I was a bricklayer out of work looking for work.'' Carlin credibly testified that the receptionist ''gave me an application and invited me into the office to sit at a desk in the back corner to fill out the application.'' Carlin completed the application and gave it back to the receptionist, at which time she told him that ''Bill Farmer was out of town on vacation, he'd be back next week and he'd look at the application and get back with me.''

Philip Vicente, who began work for Respondent at Marine Midland Towers in Rochester on July 24, appeared to me to be a credible witness. On August 14 Pommerening handed Vicente a blank petition which stated ''we, the undersigned employees of Lancet Arch, Inc., hereby petition for a wage increase of $2 an hour to be effective immediately.'' Vicente discussed the petition with his coworkers but he was the only one who signed it. At the end of the day, Vicente posted the petition on the wall of the work trailer field office. Vicente credibly testified that on August 16, William Heaster, vice president of Respondent, approached Vicente, together with three or four fellow workers, during their lunchbreak, and told them ''if we signed the petition we might get the $2 an hour now, but we wouldn't have any work next year.''

Matthew Smith was employed by Respondent from March 14 until May 1. Smith testified that several days prior to his having been hired, he spoke to Dan Van Kowenberg, the foreman at the East Rochester jobsite, to apply for work. Smith testified that he asked Van Kowenberg if Respondent was hiring and Van Kowenberg asked him ''if I was Union.'' Smith testified that he answered that he was not a member of the Union. Smith further testified that before he began his employment with Respondent, Van Kowenberg again asked me ''if I was sure I wasn't a member of the Union.'' Smith testified that that he again replied ''no.'' Van Kowenberg denied that he ever asked Smith whether he was a union member.

B. *Discussion and Conclusions*

1. Supervisory status

Respondent contends that Van Kowenberg was foreman in title only but did not have supervisory status. On April 25 Smith was injured on the job. Several days later he came to work for 2 hours and was sent home by Van Kowenberg. Van Kowenberg told him when he sent him home that ''things were slow.'' On May 1 he was laid off by Van Kowenberg. I credit Smith's testimony that Van Kowenberg gave him his day-to-day work assignments. In addition, Van Kowenberg testified that he made recommendations with respect to hiring, and that Respondent relied in part on his ''judgment.'' I find that Van Kowenberg was a supervisor within the meaning of the Act. See *DST Industries*, 310 NLRB 957, 958 (1993).

[1] All dates refer to 1995 unless otherwise specified.

2. Employment applications

On March 20, Pommerening, accompanied by Mirabella, Morey, McCarthy, and Carlin, went to Respondent's office to apply for employment. They identified themselves as union members and were wearing union hats. They were not given applications and Farmer told them that ''at this time he was not looking for any masons'' and that he still had ''other masons that he had to call back, that were on present layoff.'' A month later, on April 21, Carlin applied for employment but did not indicate that he was a union member and was not wearing a union T-shirt or hat. At this time he was given an application and was invited into the office to sit at a desk and fill out the application. While Farmer testified that he explained to Pommerening that the Company was not taking applications for masons because there were masons who were presently on layoff, Farmer conceded that with respect to laborers, the Company accepted applications even though other laborers were on layoff status. I find that the General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision not to provide employment applications to the union members. I further find that Respondent has not satisfied its burden of demonstrating that the ''same action would have taken place even in the absence of the protected conduct.'' See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). I conclude, that by refusing to provide employment application forms to the union members, Respondent has violated Section 8(a)(1) and (3) of the Act. See *Ultrasystems Westem Constructors*, 310 NLRB 545 (1993), as modified 316 NLRB 1243 (1995).

3. Threat of loss of employment

As stated earlier, Vicente appeared to me to be a credible witness. After he affixed the petition asking for a $2 raise to the trailer wall, Heaster came to him and several of his coworkers and told them ''we might get the $2 an hour now, but we wouldn't have any work next year.'' I find that Heaster's statement constitutes an unlawful threat, in violation of Section 8(a)(1) of the Act. See *Medical Center of Ocean County*, 315 NLRB 1150, 1154 (1994).

4. Interrogation

The complaint alleges that Van Kowenberg interrogated an applicant for employment about his union membership. Smith testified that in early March Van Kowenberg asked him ''If I was Union,'' to which Smith replied ''no.'' Smith further testified that several days later, Van Kowenberg asked him ''If I was sure I wasn't a member of the Union,'' to which Smith again replied ''no.'' Van Kowenberg denied that such a conversation took place. There was nothing in the demeanor of the witnesses or in the evidence, which would indicate why one of the two witnesses should be credited over the other. Accordingly, I do not credit Smith's testimony concerning the interrogation and I find that the General Counsel has not sustained its burden of proving the allegation. See *National Telephone Directory Corp*., 319 NLRB 420, 422 (1995). Therefore, the allegation is dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with loss of work if they signed a petition seeking a wage increase, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

4. By refusing to provide employment application forms to applicants because of their union membership, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act with respect to Respondent's refusal to provide employment application forms to union members, in *H. B. Zachry Co*., 319 NLRB 967, 968 (1995), the Board's Order provided backpay ''to those whom [respondent] would have hired but for its unlawful conduct.'' See also *Ultrasystems Western Constructors*, supra, 316 NLRB 1243. While I believe that such an order would have been appropriate in this proceeding, in their briefs both the General Counsel and the Charging Party have requested that I merely order Respondent to provide employment applications to the named discriminatees. Accordingly, I am not ordering a make-whole remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Lancet Arch, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with loss of work if they sign a petition seeking a wage increase.

(b) Refusing to provide employment application forms to union members and refusing to consider them for employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, provide employment application forms to Bruce Carlin, Doug Morey, Frank Mirabella, Dan McCarthy, and Larry Hand and, on submission of their completed application forms, consider the named applicants for employment.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Within 14 days after service by the Region, post at its facility in Rochester, New York, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 5, 1995.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''